

No. 1-09-0736

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FIRST DIVISION
June 6, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 01 CR 15329
)	
ERIC GARCIA,)	Honorable
)	Clayton J. Crane,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.

JUSTICES Hoffman and Rochford concurred in the judgment.

O R D E R

HELD: Circuit court order granting State's motion to dismiss defendant's post-conviction petition was affirmed because he did not make a substantial showing of actual innocence.

Defendant Eric Garcia appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing Act (Act)

(725 ILCS 5/122-1 *et seq.* (West 2008)). On appeal, he contends that the circuit court erred in dismissing his petition because he made a substantial showing of actual innocence.

The record shows that defendant and co-defendants Jose Zamora, Elias Reyes, and Fabian Carrillo were charged with the murder of Jeffrey Johnson, which occurred on November 25, 2000. Carrillo was charged with the actual shooting, and the others were charged based on the theory of accountability. Carrillo was tried separately, and this court affirmed his jury conviction for first degree murder and 52-year sentence. *People v. Carrillo*, No. 1-03-2225 (2004) (unpublished order under Supreme Court Rule 23). Defendant, Zamora, and Reyes were tried together in a bench trial with Zamora and Reyes being acquitted. This court affirmed defendant's 2003 bench conviction for first degree murder based on accountability and sentence of 26 years' imprisonment. *People v. Garcia*, No. 1-03-1994 (2005) (unpublished order under Supreme Court Rule 23).

In his direct appeal, defendant claimed, in relevant part, that there was insufficient evidence that he was accountable for Carrillo's fatal shooting of the victim. *Garcia*, order at 6. This court held that a reasonable trier of fact could have found defendant guilty of first degree murder based on accountability where he made the initial contact with the victim, told his companions that the victim was in a rival gang, pretended to

facilitate a drug transaction, admitted to Detective James Sanchez that he knew Carrillo was retrieving a gun to confront the victim, and led the victim to an alley where he knew Carrillo was waiting with the gun. *Garcia*, order at 7-8.

On April 26, 2006, defendant filed a *pro se* post-conviction petition raising numerous claims. The court advanced the petition to the second stage and appointed counsel, who filed a supplemental post-conviction petition alleging actual innocence. Counsel claimed that Carrillo's testimony at his jury trial, that he acted alone in shooting the victim and that there was no plan to kill the victim, supported defendant's claim of actual innocence. Counsel also alleged that Carrillo was unavailable as a witness at defendant's trial because his case was pending at that time.

In support of the petition, counsel attached a copy of part of the transcript from Carrillo's jury trial. According to that transcript, Carrillo testified that at 7 p.m. on November 25, 2000, he was at 21st Place and Washtenaw Avenue in Chicago. At that time, he observed three of his fellow gang members, defendant, Zamora, and Reyes, chase after a car, and went to see what was going on. Defendant was talking to the driver, who was later identified as the victim, and told Carrillo that, "[i]t's okay, he's folks." Carrillo then walked towards an alley to smoke a joint and urinate. After he urinated, he heard someone

say, "[w]hat's up, folks," and when he looked up, he saw the victim who "threw up a pitch fork." The victim then reached to his waist, and Carrillo, believing that the victim was going to kill him, shot him. Carrillo further testified that he never talked to defendant about trying to hurt the victim, did not make plans with anyone to harm him, and did not tell police that defendant pointed the victim in his direction even though this information was in his signed statement.

The State filed a motion to dismiss the petition alleging that defendant failed to demonstrate that Carrillo's account of the event was newly discovered evidence because he did not show that it was discovered after defendant's trial or that it was of such a character that it could not have been discovered earlier. The State also noted that the jury at Carrillo's trial was instructed on second degree murder and self-defense, but found him guilty of first degree murder, and that his testimony was contradicted by his own handwritten statement in which he stated that defendant pointed out Carrillo to the driver.

The State further alleged that defendant's claim that Carrillo was unavailable was conclusory and unsupported where his trial was severed from defendant's trial, and there was no affidavit from Carrillo stating that he was unwilling or unable to testify at defendant's trial. The State maintained that it was pure speculation as to whether Carrillo would have been

willing to testify at the time of defendant's trial and whether he is now willing to testify. The State also noted that defendant has not shown that Carrillo's testimony was so conclusive that it would change the outcome of his trial.

At the proceeding on the State's motion to dismiss, the State essentially reiterated the claims in its motion to dismiss. Post-conviction counsel then responded that the transcript of Carrillo's trial testimony supported and sufficiently raised the claim of actual innocence, and that the State could not attack Carrillo's credibility at the second stage proceeding because all the pleadings are to be taken as true. Counsel also stated that Carrillo had a post-conviction petition pending which made it difficult for her to obtain an affidavit from him, and that he was unavailable at defendant's trial because no attorney would put his client on to testify that he was the shooter while his case, involving the same shooting, was pending.

The State replied that it was completely speculative as to whether Carrillo was unavailable because his attorney would not allow him to testify at defendant's trial. The State also noted that the transcript that defendant relied on contained the impeachment of Carrillo, and thus, it should be able to address the credibility of Carrillo.

The circuit court granted the State's motion to dismiss. In doing so, the court noted that it was the trial judge in defendant's bench trial. The court then stated that:

"As to the newly discovered evidence, Mr. Carrillo filed a motion -- his case, he was arguing that it was self-defense, there was a series of other arguments that [he] made to a jury. Although, I was the trial judge I was not the fact finder there in that particular case. That information was available to everybody. [Carrillo] had already filed his answer in the case before [defendant] went to trial in this particular matter. And the ability to get Mr. Carrillo on the stand, even now to me, seems extremely remote."

The court also found that Carrillo's testimony would not change the result of a retrial.

On appeal, defendant argues that the circuit court erred in dismissing his petition because he made a substantial showing of actual innocence. He maintains that Carrillo's trial testimony that he acted alone and had no plans with defendant to harm the victim exonerates him. Defendant raises no issue regarding the

other allegations in his petition, and, thus, has waived them for review. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006).

A defendant is not entitled to an evidentiary hearing unless the allegations in his petition, as supported by the trial record or affidavits, make a substantial showing of a constitutional violation. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). In making that determination, all well-pleaded facts in the petition and affidavits are to be taken as true; however, nonfactual and nonspecific assertions which merely amount to conclusions are insufficient to require a hearing under the Act. *Rissley*, 206 Ill. 2d at 412. Contrary to the State's contention, we review *de novo* the circuit court's decision to dismiss defendant's post-conviction petition without an evidentiary hearing. *People v. Johnson*, 206 Ill. 2d 348, 360 (2002), citing *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

Defendant maintains that he presented an actual innocence claim based on the newly discovered evidence of Carrillo's jury trial testimony, which was not available at the time of his trial because Carrillo's case was pending at that time. To be entitled to relief under the theory of actual innocence, the supporting evidence must be new, material, non-cumulative, and of such conclusive character that it would probably change the result on retrial. *People v. Barrow*, 195 Ill. 2d 506, 540-41 (2001). Newly discovered evidence must be evidence that was not available

at defendant's trial, and that defendant could not have discovered through due diligence. *Barrow*, 195 Ill. 2d at 541. Evidence is not newly discovered even if the source was uncooperative, unknown or unavailable if it involves facts known to defendant prior to or at trial. *People v. Barnslater*, 373 Ill. App. 3d 512, 523 (2007).

Here, defendant argues that Carrillo's trial testimony that he acted alone and had no plans with anyone to harm the victim was newly discovered evidence, and that Carrillo was unavailable as a witness at the time of defendant's trial because his trial was pending at that time. Regardless of whether or not Carrillo's testimony qualified as newly discovered evidence, it was not of such a conclusive character that it would probably change the result on retrial.

As this court determined on direct appeal, there was ample evidence of defendant's guilt. *Garcia*, order at 7. Detective Sanchez testified that defendant told him that the victim was in a rival gang. After defendant informed his companions of this, he led the victim to believe he was selling drugs, stalled the victim while Carrillo went to retrieve a gun, and then directed him to Carrillo who was waiting with the gun. Antonio Vizcaino testified that he observed defendant point the victim in the direction of Carrillo who led the victim down an alley with a person known as Esparza. Shortly thereafter, Vizcaino heard a

gunshot. He then saw the victim come out holding his chest, and Carrillo fire a second shot into the victim's chest. In light of this strong evidence of defendant's guilt of first degree murder based on accountability, Carrillo's testimony that he acted alone and did not plan with anyone to harm the victim is not of such conclusive character that it would likely change the outcome on retrial. *People v. Harris*, 206 Ill. 2d 293, 301-02 (2002). We thus conclude that defendant did not meet the criteria for presenting a substantial showing of an actual innocence claim to warrant further proceedings under the Act.

In light of the foregoing, we affirm the judgment of the circuit court of Cook County granting the State's motion to dismiss defendant's post-conviction petition.

Affirmed.